Supreme Court, U.S.
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No. 03-1040

In The
Supreme Court of the United States

WASHINGTON STATE GRANGE,
TERRY HUNT and JANE HODDE,

Petitioners,

v.

WASHINGTON STATE DEMOCRATIC PARTY, et al., REPUBLICAN STATE COMMITTEE OF WASHINGTON, et al., LIBERTARIAN PARTY OF WASHINGTON STATE, et al., SAM S. REED, as Secretary of State of the State of Washington,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case challenged the constitutionality of Washington's blanket primary. The Ninth Circuit found Washington's blanket primary to be materially indistinguishable from the California blanket primary reviewed by this Court in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) ("*California Democratic Party*"). The Ninth Circuit then conducted the analysis required by *California Democratic Party* and held Washington's blanket primary unconstitutional. The Grange's Petition for Writ of Certiorari presents two questions:

Should this Court reconsider its opinion in *California Democratic Party*?

Should collateral estoppel based on a 24-year-old state supreme court case be applied to deny core First Amendment rights where the parties are different, the applicable constitutional law has changed substantially since the state decision was rendered, and state law would not apply collateral estoppel in similar circumstances?

PARTIES

The Grange Petition correctly identified the parties to the proceeding below with the following exceptions:

Respondents: "Vivan Caver" should be "Vivian Caver." "Ted Highley" should be "Ted Higley."

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STATEMENT

The Grange premises its Petition for Writ of Certiorari ("Petition") on the argument that the Ninth Circuit concluded, in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003), that blanket primaries are *per se* unconstitutional. Petition at 4. This argument is the same one made by the State of Washington in its previously-filed Petition for Writ of Certiorari ("State Petition") in this case. State Petition at 3 (No. 03-801) ("This case presents the question whether Washington's system is *per se* unconstitutional based upon this Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). . . ."). The Grange did not support the State Petition.

As set forth in more detail in the Democratic Party of Washington's Opposition to [State's] Petition for a Writ of Certiorari ("Democratic Opposition"), the Ninth Circuit did not find Washington's blanket primary – or any other kind of primary in any state – to be *per se* unconstitutional. *See* Democratic Opposition at 15-19 (No. 03-801). Instead, the Ninth Circuit reviewed Washington's blanket primary; considered, but rejected as distinctions without a difference, the alleged differences between Washington's blanket primary and the California blanket primary invalidated by this Court in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) ("*California Democratic Party*"); and held that because the two primaries were materially indistinguishable in terms of their effect on the First Amendment right of association, they were similarly unconstitutional unless justified as narrowly tailored to advance a compelling State interest. The State and Grange could not justify the burden placed upon First Amendment rights by Washington's blanket primary and

the Ninth Circuit therefore found Washington's blanket primary unconstitutional.

The Ninth Circuit did not extend First Amendment law in this case. It applied the law established in this Court's recent, clearly articulated, 7-2 decision in *California Democratic Party*. The Grange's Petition does not raise any issue that warrants review by this Court. The Grange is simply asking this Court to reverse its decision in *California Democratic Party*.

In the alternative, the Grange asks this Court to order the Ninth Circuit to ignore the *California Democratic Party* decision and hold that a 24-year-old Washington Supreme Court decision should be res judicata in circumstances in which neither the courts of Washington nor this Court would impose collateral estoppel. The Grange asks this Court to deny the citizens of Washington First Amendment protections that are guaranteed under binding Supreme Court precedent throughout the rest of the United States.

1. Washington State Historical Background

The historical facts relevant to the blanket primary have previously been set forth by the State of Washington in its Petition for Writ of Certiorari in the matter, as supplemented by the Democratic Party of Washington ("Democratic Party") in its Opposition to that Petition. *See* State Petition at 3-5; Democratic Opposition at 2-3. The material below is supplemental to the factual assertions made by the Grange in its Petition.

The Grange states that Washington's Constitution gives voters the right to vote using a secret ballot in all

"elections." Petition at 5. The Grange omits from its statement of facts any reference to clear Washington State precedent establishing that the word "elections" in the Washington Constitution means general elections and that the term does not include primary elections. *See Corhery v. Hinkle*, 217 P. 47, 48 (Wash. 1923) ("[T]he constitutional 'elections' do not include 'primary elections.'"). This case challenges a primary election law.

The Grange Petition states that Washington has never required voters to register by political party. Petition at 6. The Grange omits the fact that until adopting the blanket primary Washington provided the substantive equivalent of party registration. A voter seeking a party ballot in a primary could be challenged and required to publicly "make oath or affirmation that he [or she] intends to affiliate with the party whose ballot he demands at the ensuing election, and that he [or she] intends to support generally the candidates of that party." *State ex. rel. Zent v. Nichols*, 97 P. 728, 731 (Wash. 1908).

The Grange Petition states that a statute passed by the Legislature "for 'party primaries'" was overwhelmingly rejected by Washington voters in Referendum 15 in 1922. Petition at 6. In fact, the statute in question was an attempt by the Legislature to regulate "political party caucuses, conventions and the election of political party offices." (ER 1016.) Referendum 15 was a rejection by Washington voters (57,324 to 140,299) of the State attempt to control party affairs, not a rejection of the party control of its candidate selection process. *Id.* In political science terms, according to State expert David Olson (relied upon as well by the Grange), Washington nominated candidates by party convention or petition from statehood until 1907,

and by closed primary from 1907 until the blanket primary was adopted. *Id.*

The Grange asserts that an avowed purpose of the blanket primary law "was protecting against corruption or control over the nominating process by political bosses or special interests." Petition at 6. The Grange provides no citation of any evidence to support this assertion and no supporting evidence exists in the record.

The Grange asserts that the blanket primary has "allowed Washington to establish an enviable record of among the highest voter turnout in the States." Petition at 6. The Grange does not cite the basis of this statement or clarify whether the statement refers to turnout in primary elections or general elections. Even assuming the statement is correct, if the reference is to primary election turnout, this Court has said that increasing turnout in a primary by means of a blanket primary is not a compelling state interest and may not even be a legitimate one. *California Democratic Party*, 530 U.S. at 584. If the reference is to general election turnout, the record in this case indicates the statement is speculative at best and more likely simply wrong. Turnout for Washington's general election in each of the past four elections has been lower than turnout in neighboring Oregon's general election, and has been lower than turnout in neighboring Idaho half the time. (ER 810-811 (Tables 9a and 9b).) Neither Oregon nor Idaho has a blanket primary.

2. Proceedings Below

a. Prior Challenges to Washington's Blanket Primary

A Republican voter challenged the constitutionality of the new blanket primary law soon after it came into effect but his challenge was rejected on the basis that the Constitution did not protect political parties or, implicitly, their members' freedom of association. *Anderson v. Millikin*, 59 P.2d 295, 296-97 (Wash. 1936) (citing *Zent*).[1]

In 1980, after this Court explicitly recognized a First Amendment right of association, a faction[2] of the Democratic Party in Washington again challenged the blanket primary. *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980). The Washington Supreme Court acknowledged that its holding in *Anderson* would need to be re-examined in light of the now-recognized constitutional right of association. 611 P.2d at 1257. The court rejected the challenge to the blanket primary on the basis that no United States Supreme Court case had extended the right of association in political affairs to areas outside of racial discrimination or participation in the electoral process and that no evidence of a burden upon these associational rights had been introduced. 611 P.2d at 1258-59. The court predicted little

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[1] The Grange states that *Anderson* involved a challenge by the "Democratic and Republican political parties," Petition at 7, but no mention is made of the political parties in the case caption and the opinion states that "the plaintiff, by his amended complaint, alleges that he is a qualified voter, a member of the Republican party, and desirous of advancing its principles . . ." 59 P.2d at 295.

[2] The Democratic Party was implementing a substantial reorganization at the time. Some of the difficulties involved in the implementation are described in *Marchioro v. Chaney*, 442 U.S. 191 (1979).

likelihood that the freedom of association would be interpreted more expansively. *Id.* at 1259. However, shortly after the court's *Heavey* decision, this Court clarified that the right of association did extend beyond the limits assumed in *Heavey*, holding, in *Democratic Party of the United States v. Wisconsin ex. rel. La Follette*, 450 U.S. 107 (1981), that the right of association "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only," *id.* at 122.

After the *California Democratic Party* decision in 2000, the Democratic Party brought this suit challenging Washington's blanket primary. Despite *California Democratic Party*, the State continues to use its partisan blanket primary and forced the Democratic Party to accept nominees selected by the blanket primary in 2001, 2002 and 2003.

b. *Munro v. Socialist Worker's Party*

The Grange Petition asserts that this Court upheld Washington's blanket primary law in *Munro v. Socialist Worker's Party*, 479 U.S. 189 (1986). Petition at 7. This is not correct. The *Munro* decision does not uphold the blanket primary. This Court expressly set forth the question it was resolving in *Munro*:

> The State of Washington requires that a minor-party candidate for partisan office receive at least 1% of all votes cast for that office in the State's primary election before the candidate's name will be placed on the general election ballot. The question for decision is whether this statutory requirement, as applied to candidates

> for statewide offices, violates the First and Fourteenth Amendments to the United States Constitution. The Court of Appeals for the Ninth Circuit declared the provision unconstitutional. 765 F.2d 1417 (1985). We reverse.

479 U.S. at 190-191. Constitutional limits on the power of the State to dictate participation in a political party's candidate selection process were not addressed in *Munro*. The constitutionality of the blanket primary was neither challenged nor ruled upon.

c. The Ninth Circuit Decision

As set forth in more detail in the Democratic Party's Opposition to the previously filed State Petition, the Ninth Circuit did not hold that Washington's primary was *per se* unconstitutional. The Ninth Circuit first analyzed the differences that, according to the State and Grange, existed between Washington's primary and the California primary held unconstitutional in *California Democratic Party*. After examining the alleged differences, the Ninth Circuit found them constitutionally insignificant. This result was not surprising. The evidence before this Court in *California Democratic Party*, which showed the pervasive and severe burden that the California blanket primary imposed on associational rights, was based on the effects that Washington's blanket primary had had on political parties and candidates. Washington had also argued to this Court as an *amicus* in *California Democratic Party* that Washington and California's blanket primaries were constitutionally identical. *See* Democratic Opposition at 15-19; *see also id.* at 4-11 (discussing evidence before the Ninth Circuit of constitutional similarity

between the unconstitutional California blanket primary and the Washington blanket primary).

The assertion in the Petition that the Ninth Circuit held "blanket *and open primaries per se* unconstitutional" in *Reed* (first emphasis added) is without foundation. In *Reed*, the Ninth Circuit noted that this Court "carefully distinguishes blanket primaries . . . from an 'open' primary." 343 F.3d at 1203. The Ninth Circuit then found that "[t]he Washington statutory framework is a straight blanket primary, not an open, closed or non-partisan primary." *Id.* In *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277 (9th Cir. 2003), decided after this case, although noting that serious constitutional concerns were raised by the Arizona open primary, which allowed independents but not partisans from other parties to participate in a party's primary, the Ninth Circuit again rejected the position that an open primary was *per se* unconstitutional and remanded the case back to the district court for further fact finding and analysis. 351 F.3d at 1282.

REASONS FOR DENYING THE PETITION

The Petition should be denied for the most basic reason: The Ninth Circuit correctly applied the law and reached the correct result. Additionally, there is no conflict between courts that warrants review and the Ninth Circuit decision is in any event isolated in its effects. Finally, the Petition's request for an advisory opinion from this Court is based on the false premise that the Ninth Circuit opinion conflicts with other opinions.

1. The Ninth Circuit Did Not Err in Ruling Unconstitutional Washington's Blanket Primary After Finding That It Had No Constitutionally Significant Differences from the Blanket Primary Ruled Unconstitutional in *California Democratic Party v. Jones*

The Ninth Circuit properly applied the teachings of *California Democratic Party*. The Ninth Circuit first examined whether the alleged differences between the Washington and California blanket primaries that had been identified by the Grange and State were constitutionally material, and determined they were not.[3] The Ninth Circuit then subjected Washington's blanket primary to the strict scrutiny required by *California Democratic Party*.

In arguing to the Ninth Circuit that Washington's blanket primary should not be subjected to the same strict scrutiny that this Court imposed upon California's blanket primary, the State of Washington asserted that two distinctions existed between the Washington and California primaries. The Ninth Circuit carefully considered the distinctions that the State asserted existed between Washington's blanket primary and California's – that even though in partisan races only one candidate from each party is allowed to advance to the general election ballot, the State does not characterize them as party nominees;

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[3] The Ninth Circuit's conclusion that Washington's blanket primary is materially indistinguishable from the California primary is buttressed by the fact that Washington itself urged this Court to consider the two primaries as constitutionally identical in an *amicus* filed in the *California Democratic Party* case.

and that Washington has no party registration – and concluded that these were "distinctions without a [constitutional] difference." *Reed*, 343 F.3d at 1203-4.

It was not error for the Ninth Circuit to reject Washington's first argument. The State has no right to change a party's message by forcing it to associate with candidates on the general election ballot who have been selected in violation of party rules, whether or not those candidates are labeled by the State as "nominees." Moreover, as set forth in the Democratic Party's Opposition to the State Petition, the fundamental premise of the State's argument blatantly contradicts Washington statutory and case law and political history. Washington has always treated the survivors of its blanket primary as party nominees.

The Ninth Circuit also correctly concluded that the absence of party registration in Washington does not mean that voters in Washington do not have party preferences. The State's expert, Dr. Olson, advised the district court that:

> A recent survey of voter identification with parties reveals that in Washington State there is close parity between Republican and Democratic party identifiers, and those calling themselves independent in Washington are nearly identical with those who similarly label themselves nationally.[4]

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[4] The testimony of Dr. Todd Donovan on behalf of the State was similar: "Survey data suggest that voter attachments to parties, and partisan behavior in the electorate in Washington, are virtually identical to that observed in comparable states that use closed primaries." (ER 0801.)

(ER 1023.) The Ninth Circuit found that the right of these party adherents to select their nominee was thwarted by Washington's blanket primary. The State's experts (also relied upon by the Grange) conceded that the blanket primary led to dilution of the votes of party adherents and alteration of the message of party candidates. (ER 1010-11, 1025, 1082-84.) The Ninth Circuit correctly concluded that the burden placed upon the right of association of party adherents by Washington's blanket primary is severe.

2. The Ninth Circuit Decision in *Reed* Does Not Conflict with any Decision of Washington's Supreme Court

The Grange argues that the Ninth Circuit's decision conflicts with the decision of the Washington Supreme Court in the 1980 case of *Heavey v. Chapman*, 611 P.2d 1256.

The *Heavey* decision was premised, in substantial part, upon the Washington Supreme Court's conclusion that the First Amendment right of association did not extend in political affairs beyond racial discrimination or participation in the electoral process, and the undisputed fact that the challenge to the blanket primary before it at that time did not allege racial discrimination or impediment of participation in the electoral process. 611 P.2d at 1259. In its *Heavey* opinion, the Washington Supreme Court predicted that the scope of the freedom of association would not likely be extended. *Id.* Contrary to that prediction, this Court subsequently announced its decisions in *La Follette,* 450 U.S. 107; *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986); *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214 (1989);

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997); and *California Democratic Party*, 530 U.S. 567, all of which extended the First Amendment right of association beyond the only two areas in which the *Heavey* Court believed it relevant. There is no reason to believe that Washington's Supreme Court would today fail to appreciate the extent of the First Amendment right of association and the burden on associational rights imposed by blanket primaries.

Moreover, when it decided *Heavey*, the Washington Supreme Court did not have before it the overwhelming evidence of burden on the right of association caused by the Washington blanket primary, which was subsequently submitted to this Court in connection with *California Democratic Party* and which was also in the record reviewed by the Ninth Circuit in this case. There is no reason to believe that Washington's Supreme Court would have ignored that evidence or, after reviewing it, that it would have reached a different conclusion from this Court's about the magnitude of the constitutional burden that Washington's blanket primary imposes upon the right of association.

Finally, after the Washington Supreme Court decided *Heavey*, the State adopted its presidential preference primary. As the Ninth Circuit noted, Washington's presidential preference primary requires voters to disclose their political affiliation as a condition of voting in the primary and requires the State to disclose those affiliations to the political parties. *Reed*, 343 F.3d at 1205. *Heavey's* conclusion that Washington has a compelling interest in protecting the party affiliation of its voters is no longer valid (if it ever was) in light of the State's action in adopting the presidential preference primary.

There is no conflict between the Ninth Circuit's decision and the decision of the Washington Supreme Court that warrants review by this Court.

3. The Ninth Circuit Correctly Declined to Impose Collateral Estoppel to Bar this Challenge to the Blanket Primary

It would have been inappropriate to use issue or claim preclusion based on the 1980 *Heavey* case to dismiss this challenge to Washington's blanket primary. To do so would give the *Heavey* decision greater preclusive effect than the state court that rendered it would give it, contrary to the principles established by this Court. *See, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 375 (1996).

The parties in *Heavey* are different than the parties here and are not in privity with one another. The Grange was not a party to either case. None of the individual Democratic Party Plaintiffs in this case were parties to the *Heavey* litigation. The governing body of the Washington State Democratic Party pursuant to its Charter, the Washington State Democratic Central Committee, was not convened, and its officers were not elected and empowered, until 1981, after the decision in *Heavey*. (ER 371.) The application of collateral estoppel or res judicata in Washington requires an identity of parties that does not exist here. *Rains v. State*, 674 P.2d 165, 168-69 (Wash. 1983).

Washington will not give a decision preclusive effect in the absence of at least privity between the prior parties and the parties to the current case. Where personal rights such as the First Amendment right of association are concerned, as here, Washington will not find privity.

Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282, 1285 (Wash. 1989).

Finally, Washington does not give preclusive effect to past judgments where issues of great public importance are involved. *Kennedy v. City of Seattle*, 617 P.2d 713, 715-16 (Wash. 1980). The constitutionality of a challenged statute is of such importance. *Id.* (constitutional validity of houseboat ordinance was of great enough public importance to bar the application of collateral estoppel).

Federal policy is similar. Collateral estoppel is inappropriate if there has been a significant intervening change of law. *Montana v. United States*, 440 U.S. 147, 161-62 (1979). In this instance, *California Democratic Party*, 530 U.S. 567; *Eu*, 489 U.S. 214; *Tashjian*, 479 U.S. 208; and *La Follette*, 450 U.S. 107, together amount to an intervening change in the law that renders it inappropriate to apply collateral estoppel or res judicata. These cases extend the right of association to apply to political parties and their members, and establish and uphold the right of political parties to define participation in their candidate selection processes and other internal affairs.

4. The Ninth Circuit Decision Does Not Conflict with *Munro v. Socialist Worker's Party*

The *Munro* case concerned whether it was constitutionally unreasonable to require a political party to achieve at least 1% of the primary vote before advancing to the general election. There was no discussion in *Munro* of the issues addressed by the Ninth Circuit in this case, namely, the burdens on First Amendment rights that occur when the State forces a political party to adulterate its candidate selection process. The two cases

are focused on different aspects of political activity – participation in the selection of a party's candidate and advancement from the primary to the general election – and are not in conflict.

Contrary to the Grange's apparent suggestion, moreover, the combination of *Reed* and *Munro* does not impose unconstitutional burdens upon minor political parties' access to the general election ballot. The Grange assumes that when Washington's legislature replaces Washington's unconstitutional blanket primary it will not also consider ballot access limitations on minor parties in the context of its new law. Even if Washington continues to require minor parties to have 1% of the primary vote before advancing to the general election ballot, such a requirement would likely be constitutional. *Cf. Jenness v. Forston,* 403 U.S. 431 (1971) (unanimously rejecting challenge to constitutionality of requirement that minor party obtain petitions signed by 5% of eligible voters); *American Party of Texas v. White,* 415 U.S. 767 (1974) (upholding constitutionality of requirement that candidates demonstrate support by obtaining petition signatures of 1% of electorate, where voters signing petitions were required to swear under oath that they had not participated in another party's primary or nominating process).

5. There Is No Conflict Within the Ninth Circuit

The Grange Petition asserts that the Ninth Circuit decision in this case conflicts with the Ninth Circuit's decision in *Bayless*. This is incorrect. The two cases address different kinds of primary systems.

Arizona's primary system is used to elect both party officials (precinct committee persons) and to select the

party's candidates for public office. As to the election of party officers, the Ninth Circuit held Arizona's system unconstitutional because this Court's decision in *Eu* required strict scrutiny to be applied where party members sought to associate only with party members in freely choosing their party leaders. *Bayless*, 351 F.3d at 1281 (citing *Eu*). Arizona was unable to articulate any State interest that justified allowing non-members to vote for the leadership of the Libertarian Party. The present case does not involve the participation by non-members in the election of party officials, such as precinct committee persons, and there is no conflict between the two Ninth Circuit decisions in regard to limits on participation in the election of party officials.

With regard to the selection of party candidates, *Bayless*, unlike this case, did not involve a blanket primary. In a blanket primary, such as Washington's, a political party is forced by the State to allow participation in its candidate selection processes both by independents and by members of hostile political parties. The circumstances were different in *Bayless*, which involved a primary system in which a political party could exclude voters registered to hostile political parties but could not exclude independent voters. In addition, Arizona limited independents to voting in only one party's primaries, where under Washington's blanket primary system a voter can vote in multiple political parties' primaries on the same day. The Ninth Circuit expressly highlighted these two aspects in holding that the system in Arizona differed in at least two respects from a blanket primary such as the ones held unconstitutional in *California Democratic Party* and in its decision in this case. *Bayless*, 351 F.3d at 1282.

Accordingly, while the Ninth Circuit believed that Arizona's system of selecting candidates for public office raised serious constitutional concerns, it remanded the case for further fact finding with regard to the potential impact of the system on the selection of party nominees or the candidates' positions. *Id.*

In both the present case and the *Bayless* decision, the Ninth Circuit uses an identical approach. It first examines the primary system at issue to determine whether the system is, on its face, materially different from the California blanket primary found unconstitutional in *California Democratic Party*. If the primary system is not materially different from California's blanket primary, as is the case with Washington's blanket primary, the Ninth Circuit applies strict scrutiny to the system as required by *California Democratic Party*. If the primary system is materially different on its face from the California blanket primary, as is Arizona's, then the Ninth Circuit requires the district court to conduct a factual inquiry into whether the system imposes a risk of skewing primary results or candidate positions in order to determine the severity of the burden placed by the system on First Amendment rights. The Ninth Circuit treats like cases alike, and there is no conflict between the present case and the Ninth Circuit decision in *Bayless*.

6. This Is Not an Appropriate Vehicle for Rendering an Advisory Opinion on Primaries in Other States

The Grange asks that this Court give it an advisory opinion extending the *California Democratic Party* decision and delineating the kinds of primaries that are unconstitutional. This case is not a good vehicle for doing

so. This case involves Washington's blanket primary, which is indistinguishable from the primary reviewed in *California Democratic Party*. The evidence considered by this Court in *California Democratic Party* was largely drawn from political scientists' analyses of the effects on First Amendment rights from Washington's blanket primary. Granting relief in this case would be tantamount to reversing the *California Democratic Party* decision. If this Court wishes to express further opinions on the constitutionality of other primary systems, a case involving an open primary or a semi-closed primary would be a more appropriate vehicle.

The Grange contends that an advisory opinion is warranted because of a conflict it sees between the decisions of the Ninth Circuit in *Reed* and *Bayless* and because it believes that this Court's prior decision in *California Democratic Party* needs clarification. As shown above, there is no such conflict. Moreover, the *California Democratic Party* opinion and the Ninth Circuit opinions in this case and in *Bayless* are both straightforward and clear, and can be readily applied by legislatures and election officials who seek in good faith to protect the First Amendment right of association. Because the Ninth Circuit's opinions are both clear and consistent, there is no merit to the Grange's claim that only an advisory opinion by this Court will avert administrative difficulties in administering the 2004 elections.

The Grange also suggests that review is warranted because 2004 is a Presidential election year with many races on the ballot and Washington's primary is only six weeks before its general election. Petition at 20-21. Washington State has had ample notice of the need to reform its primary system since the *California Democratic Party*

decision in 2000. The Ninth Circuit opinion in this case was issued on September 15, 2003 – over a year before the 2004 primary in Washington. Neither the Grange nor the State requested a stay of the Ninth Circuit's opinion. In fact, the State filed an expedited motion for rehearing or rehearing en banc in the Ninth Circuit on the basis that the Legislature needed to know as soon as possible that the decision of the Ninth Circuit was final. If the State has difficulty implementing a constitutional primary system because it has delayed making the decision to do so, the fault lies with State officials. In any event, "administrative convenience" for the State is not a justification for continuing to place a severe burden on a political party's freedom of association. *Tashjian*, 479 U.S. at 218.

Finally, the Grange contends that an advisory opinion is warranted because this case conflicts with provisions of the Washington constitution. The Ninth Circuit's holding does not conflict with any provision of the Washington constitution applicable to primary elections. Washington's Supreme Court has held that the state constitutional provisions cited by the Grange only apply to general elections – not primaries. *See Corhery v. Hinkle*, 217 P. 47, 48 (Wash. 1923). This case is about primary elections, not general elections. Moreover, the associational rights of parties cannot be trumped by the desire of non-party members to participate in a party's primaries in addition to voting in the general election. As this Court explained in *Jones*, "'nonmember[s'] desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." 530 U.S. at 583 (quoting *Tashjian*, 479 U.S. at 215 n.6).

CONCLUSION

The Ninth Circuit decision is correct. The Petition of the Grange for Writ of Certiorari in this case should be denied.

Respectfully submitted,

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